

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY
MARY T. NUESCA
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

April 3, 2009

REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

COUNCILMEMBER BEING APPOINTED TO THE
COMMISSION ON GANG PREVENTION AND
INTERVENTION

BACKGROUND

In 2006, pursuant to its authority in San Diego Charter section 43(a), the City Council created and established a Commission on Gang Prevention and Intervention [CGPI] codified in San Diego Municipal Code sections 26.1901-26.1903. CGPI serves as an "official advisory body" to the Mayor and City Council on policy issues related to gang prevention and intervention. San Diego Municipal Code § 26.1901. Originally, CGPI consisted of seventeen members serving without compensation, appointed by the Mayor and confirmed by City Council. Eight members were chosen from nominations by City Council and eight were chosen from statutorily prescribed fields such as education and social services. San Diego Municipal Code § 26.1902. San Diego Municipal Code section 26.1902 was recently amended to add certain office holders, such as the District Attorney and the San Diego Unified School District Superintendent, and to delete duplicative positions. CGPI now consists of twenty-one members.

QUESTION PRESENTED

At its April 28, 2008 City Council meeting, the City Council asked the City Attorney to report to the Committee on Public Safety and Neighborhood Services [PS&NS] on the legality of appointing a councilmember to CGPI. In July 9, 2008, this Office reported to PS&NS that it had concerns about the legality of appointing a councilmember to CGPI based on the City Charter and Government Code section 1099 (incompatible offices). At that time, the City Attorney was directed by PS&NS to seek an Attorney General opinion on the Government Code section 1099 issue.

SHORT ANSWER

This Office concludes that the City Charter prohibits the appointment of a Councilmember to an advisory board created pursuant to Charter section 43, such as the CGPI. The Charter prohibits such appointment, therefore, it is not necessary to address Government Code section 1099. Accordingly, this Office recommends that a councilmember not be appointed to CGPI.

ANALYSIS

A. City Charter section 43

The City's Charter, taken as a whole, does not contemplate councilmembers as appointees to advisory boards when those boards are created by ordinance pursuant to Charter section 43 for the purpose of giving advice to the Council, Mayor, and City Manager.¹

The duty of an advisory board is to "consult and advise with the Mayor, Council, or City Manager..." Charter § 43. The plain reading of Charter section 43 is that the persons giving the advice are not the same as those receiving the advice.

The process of appointments itself assumes that board members are not councilmembers. The Council confirms the mayoral appointees to advisory boards. When the Mayor is vested with appointment authority, but fails to exercise it, the Council may make the appointment. Charter § 43(c). Only the Council has removal authority over committee and board members. The removal authority of the Council strongly suggests that councilmembers are not intended to be members of advisory boards.

This Office previously opined that appointees to boards and commissions are vested with discretionary powers and functions that are not subject to Council control, absent specific authority stating otherwise. 1984 Op. City Att'y 1 (attached). In considering the issue of Council control, the author referenced a variety of different types of boards and commissions and stated that "none of the appointees are members of the City Council," and cited several reasons why appointees to boards and commissions are not councilmembers: the offices are incompatible,² and appointing a councilmember destroys the independent status of the board and the purpose for which the board was created. Moreover, even if the offices were not considered to be incompatible, it would be impractical and non-sensical for a councilmember to sit on a body that was created to advise the Council.

We recognize that with the addition of certain officeholders³ to CGPI, it appears that the Council is not represented while other governmental departments and agencies are represented. This would be a concern if CGPI was a countywide task force or a joint powers authority, or other similar body. In this instance, CGPI exists to provide information, analysis, and advice to the Council and in that way, is in a supporting role to the role of the Council, not an independent body with its own governmental sovereignty.

¹ This memorandum does not address bodies created by state law, such as joint power authorities or the Housing Commission, nor does it address commissions created pursuant to the Charter itself.

² Opinion 84-1 did not analyze the precise issue of an appointment of a councilmember to an advisory board. Because the Charter precludes the appointment, a further analysis of the doctrine of incompatibility, now codified in Government Code section 1099, is not necessary.

³ The County District Attorney, County Chief of Probation, Chief Administrator of Parole, County Sheriff, San Diego Unified School District Superintendent, County Office of Education Superintendent, and Chief of Police were added to CGPI in 2008. City of San Diego Ordinance No. O-19748.

The additional members to CGPI are officeholders who, by nature of their job, are obvious partners in the search for ways to prevent youth from joining gangs, and who can intervene in gang behavior. The officeholders have no particular “control” over the other CGPI members in the way that the Council does by virtue of its removal authority. Additionally, CGPI does not provide reports, analysis, and advice to any of those offices as it does for the Council.

The Council relies on citizen-based advisory boards to research issues, reach out to the community, and to make recommendations to the Council and Mayor. The Charter does not contemplate a merging of the functions of Council and advisory boards.

B. City Charter section 12

Article III of the San Diego City Charter sets forth both the powers and role of the City Council. As a general rule, councilmembers are required to devote full time to the duties of their office and may not hold any other elected office or employment with the City. Charter §§ 12(j), 138. Charter section 12(k) provides for a limited number of exceptions to this rule:

Council members shall not be eligible during the term for which they were appointed or elected to hold any other office or employment with the City, except as Mayor or City Attorney and as a member of any Board, Commission or Committee thereof, of which they are constituted such a member by *general law* or by this Charter. (emphasis added)

There is no requirement in the Charter for a councilmember to sit on CGPI. In contrast, Charter section 39.1 creates an Audit Committee which is composed of, in part, two members of the City Council.

As to any “general law”, that phrase, as used in section 12(k), refers to laws that operate outside of matters covered by the Charter. The Charter covers matters of purely local concern, also known as municipal affairs. California Constitution Article XI, section 5(a), says, in part:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.

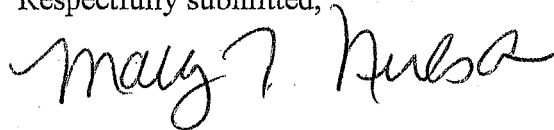
In interpreting this section, the California Supreme Court has said that the city charter is an instrument of limitation and restriction over all municipal affairs. *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 599 (1949). With respect to municipal affairs, the City is not subject to general law except as the charter may provide. *Id.* As *City of Grass Valley* notes, the general or state law operates outside the charter city’s municipal affairs. “General law” thus covers matters not considered a municipal affair, i.e. matters of state law. There is no state law requirement that a councilmember be appointed to its own advisory board.

CONCLUSION

The Charter does not permit a councilmember to sit on a "Charter section 43" body. A councilmember could be appointed as a liaison between the City Council and CGPI, similar to the appointment of a councilmember to the City of San Diego Youth Commission. San Diego Municipal Code § 26.1604.

Alternatively, if the nature of the CGPI is changed to something other than a purely city advisory board within the meaning of Charter section 43, such as a regional task force, this analysis would not apply.

Respectfully submitted,



Mary T. Nuesca
Chief Deputy City Attorney

MTN:ar
RC-2009-3

Attachment: Office of the City Attorney Opinion 84-1

R. S. TEAZE
ASSISTANT CITY ATTORNEY
S. M. FITZPATRICK
DEPUTY CHIEF CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101-3863
(619) 236-6220

OPINION NO. 84-1

DATE: January 19, 1984
SUBJECT: Ability of the Council to Control the
Vote of Persons Appointed to Serve on
Boards or Commissions
REQUESTED BY: Committee on Rules, Legislation and
Intergovernmental Relations
PREPARED BY: Robert S. Teaze, Assistant City Attorney

QUESTION PRESENTED

Does the City Council have the power to control the
vote of persons appointed by the Council to serve on boards
or commissions?

CONCLUSION

In general, boards and commissions of entities whether
created by the City Council or not have discretionary powers
and functions and the vote of the persons appointed by the
Council, whether or not they are also Council members, is
not subject to the control of the City Council.

ANALYSIS

There are a variety of boards and commissions to which
the Council makes appointments. Boards can be created by the
Council by virtue of authority found in Charter Section 43.
Commissions are created by the Charter itself and are listed
in Section 41. There are the various corporations the City
has created under authority of the general powers such as
San Diego Transit, Data Processing and Centre City Development.
There are bodies created under the joint power authority
of State law, Government Code Section 6500 et seq., such as
the Stadium and Planetarium Authorities. There is, as well,
the Charter-created Retirement Board in whose charge Article
IX of the Charter has placed the running of the City's Re-
tirement System. Certain commissions are created by State
statute, such as the Port District, West's Harbor and Navi-
gation Code, Appendix 1, and the County Water Authority,

West's Water Code, Appendix 45.

These bodies all have discretionary functions ranging from giving of advice to the running of a business. To some of them, the Council appoints all the members. To others, the Council has one or more appointments but less than the entire board. None of the appointees are members of the City Council. One reason for this is that the appointment would be to an incompatible office. For example, a Council member could not serve on the Planning Commission and remain a member of the Council because the two offices are incompatible. People ex rel. Chapman v. Rapsey, 16 Cal.2d 637 (1940).

Another reason for not appointing a Council member would be that such an appointment destroys the independent status of the board and the purpose for which the body was created. Such would be the case, for example, with the Transit, Data Processing and Centre City Corporations. The insulation that these corporations give the City would be damaged if Council members served on their boards. Still another reason is that appointing of Council members would simply not make sense. Example of this would be if the Council were to appoint themselves to serve on ordinance-created advisory bodies such as the Park and Recreation Board. Even if the offices were not considered to be incompatible, it would hardly be practical for a Council member to sit on a body that was created to advise the Council.

Each appointee to the aforementioned types of boards and commissions is, therefore, selected to exercise a discretionary power specified in the legislation or instrument creating the body. None of the legislation or instruments creating these bodies give the Council authority to control the exercise of the discretion given the members of the board or commission. If the Council attempted to do so, as by seeking a writ of mandamus to require an appointee to vote in a certain manner, such a writ would most assuredly be denied. Lindell Co. v. Bd. of Permit Appeals, 23 Cal.2d 303 (1943); Faulkner v. Cal. Toll Bridge Auth., 40 Cal.2d 317 (1953).

There is also that kind of organization to whose governing body the Council appoints one or more of its own Council members. These organizations are either created or authorized to be created by State law. The former include Metropolitan Transit Development Board created by Public Utilities Code Sections 120000 et seq., and the Local Agency Formation

Commission created by Government Code Sections 54780 et seq. The latter include joint powers agencies such as the San Diego Association of Governments and the San Diego Regional Employment and Training Consortium authorized to be created by Government Code Sections 6500 et seq., or the Palm City Sanitation District authorized to be created by Health and Safety Code Section 4700. In the former group, as well as the Sanitation District, the State legislation requires the appointment of Council members. As for joint powers agencies, the State legislation allows such appointments. What might otherwise be a problem of incompatibility of office is avoided because of specific legislative sanction. Lowman v. Stafford, 226 Cal.App.2d 31 (1964).

All of these agencies on whose governing bodies Council members serve are entities separate from the City with identities, functions and powers of their own. The Council members who are either appointed to the governing bodies of these agencies or serve by virtue of their office are vested with individual discretionary functions which we believe cannot be controlled by the City Council and the rule in Lindell, supra, is equally applicable.

In conclusion, appointees, whether Council members or not, to the governing bodies of public entities, whether created by the Council or not, are vested with discretionary powers and functions to run those entities. That discretion is not subject to Council control absent some specific such provision.

Respectfully submitted,

JOHN W. WITT, City Attorney

By Robert S. Teaze
Robert S. Teaze
Assistant City Attorney

RST:rc:920(x043)

APPROVED:
John W. Witt
John W. Witt, City Attorney